

## REPORTER'S RECORD

## VOLUME 22 OF 35 VOLUMES

TRIAL COURT CAUSE NO. 1384794

COURT OF CRIMINAL APPEALS NO. AP-77,025

OBEL CRUZ-GARCIA

Appellant

VS.

THE STATE OF TEXAS

Appellee

) IN THE DISTRICT COURT

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) HARRIS COUNTY, TEXAS

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) 337TH JUDICIAL DISTRICT

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## GUILT-INNOCENCE PROCEEDINGS

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On the 12th day of July, 2013, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Renee Magee, Judge presiding, held in Houston, Harris County, Texas;

Proceedings reported by computer-aided transcription/stenograph shorthand.

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1 (Open court, defendant present, no jury)

2 THE COURT: This is my ruling on the  
3 accomplice witness. I am going to instruct the jury  
4 that Carmelo Martinez Santana was an accomplice witness  
5 as a matter of law. And this is why. I find that from  
6 his own testimony he stated that he did two affirmative  
7 acts. Primarily, that he was in the car when the  
8 defendant, Obel Cruz-Garcia, came back from the  
9 apartment with the boy and he remained there with the  
10 boy after he knew that the defendant intended to take  
11 the boy and harm him.

12 And then secondly, the second affirmative  
13 act that I find that he did was to sit next to him in  
14 the back seat, essentially, with Rogelio Aviles on one  
15 side and the accomplice, Carmelo Santana, on the other  
16 side, essentially blocking the boy in the back seat when  
17 he knew that the defendant intended to kidnap him, and,  
18 in fact, the defendant was kidnapping him. And  
19 although, this witness did testify that he had bouts of  
20 conscience about this, he never, never testified in all  
21 the direct or cross-examination that he intended to  
22 abandon the conspiracy, that he was acting only under  
23 duress, or that he did not want this to happen.

24 If you think that I am wrong, point me to  
25 an area where you feel that he said that. I know that

1 there was a lot of talk about the gun being in the  
2 defendant's hand, there was talk about how their  
3 relationship was, and that he was fearful of the  
4 defendant, but he never said: I only did this because I  
5 was afraid of the defendant. Because, according to the  
6 testimony, he was left alone with the boy that was  
7 kidnapped for a period of time in the car after knowing  
8 that the defendant intended to kidnap him and harm him  
9 and he did not abandon the conspiracy at this time.

10 So, I am going to instruct the jury that  
11 he's an accomplice as a matter of law. And I  
12 believe that's in the charge. Okay?

13 And for the record, we're present and back  
14 on the record in Cause No. 1384794, the State of Texas  
15 vs. Obel Cruz-Garcia. And Mr. Garcia is present at  
16 counsel table and has been present at counsel table  
17 since we went on the record. And his lawyers are with  
18 him, Mr. Cornelius and Mr. Madrid. And present for the  
19 State is Natalie Tise and Justin Wood.

20 And so, along that same lines, I did not --  
21 I do not recall and -- that there was any conflicting  
22 testimony as to whether this defendant was ever  
23 threatened or did anything under duress, but that he did  
24 those two affirmative acts in furtherance of the  
25 conspiracy of the lesser offense of kidnapping. And,

1 therefore, I'm going to find that he's an accomplice as  
2 a matter of law.

3 All right. So, is there anything else in  
4 the charge besides the two things that we've identified?  
5 Have you both had an opportunity to look through the  
6 application paragraphs?

7 MR. CORNELIUS: I haven't made it all the  
8 way through that yet, but there was this -- on Page 3 at  
9 the bottom where it talks about burglary --

10 THE COURT: Yes.

11 MR. CORNELIUS: -- a person commits the  
12 offense of burglary, and then after it says: Sexual  
13 assault as a felony. That's a loss to me why that's  
14 there right there.

15 THE COURT: Page 3?

16 MR. CORNELIUS: Yes.

17 MR. WOOD: They are defining burglary as  
18 burglary with intent to commit a -- burglary of a  
19 habitation with intent to commit another felony, which I  
20 don't think necessarily has to be alleged.

21 THE COURT: Okay. Let's cross that out,  
22 too. So, that would be from the beginning: A person  
23 commits the offense of burglary -- wait. No. They are  
24 describing burglary of a habitation as burglary with  
25 intent to commit sexual assault, which I think can be a

1 part of this case. It doesn't always have to be just  
2 with intent to commit theft. Although, is that also  
3 alleged in here?

4 MS. TISE: If we're going to specify the  
5 offense that he intended to commit, then I think we have  
6 to specify theft as well, because it can also be commit  
7 a felony after injury, whether he intended to or not.

8 THE COURT: I agree. So, what should be  
9 there is he -- on that paragraph: A person commits the  
10 offense of burglary if, without the effective consent of  
11 the owner, he enters a habitation with intent to commit  
12 a felony or theft. Would that be fair to say? I think  
13 that's the way it's in the Penal Code.

14 MS. TISE: I think that's fair.

15 THE COURT: And then again sexual assault  
16 as a felony. Although, we already have instructed them  
17 that sexual assault is a felony on the previous page.

18 MR. WOOD: But I think it probably  
19 clarifies the application to burglary of habitation  
20 since we're talking about "or commit a felony."

21 THE COURT: Okay.

22 MR. WOOD: Judge, also there was -- we  
23 talked about this yesterday. About including every time  
24 Carmelo Santana is referred, I think it probably should  
25 be Carmelo Martinez Santana.

1 THE COURT: Also known as Rudy.

2 MR. WOOD: Yeah. Instead of just Carmelo  
3 Santana based on what we talked about yesterday.

4 MS. TISE: He actually introduces himself  
5 as Carmelo Martinez and then Santana is his maternal  
6 name.

7 THE COURT: I will include that.

8 All right. Anything else?

9 Mary Ann, go off the record, please.

10 (Pause)

11 THE COURT: Is there anything else anybody  
12 else wants?

13 MR. CORNELIUS: Yes.

14 THE COURT: Mr. Cornelius, did you have  
15 something else?

16 MR. CORNELIUS: I do, Judge.

17 THE COURT: Which page?

18 MR. CORNELIUS: The first question, are we  
19 going with just sexual assault throughout the charge,  
20 not aggravated sexual assault?

21 THE COURT: Yes. We'll go with just sexual  
22 assault throughout the charge.

23 MR. CORNELIUS: Because I'm into the  
24 lesser-included offenses.

25 THE COURT: It should be all the way



1 through. We'll have to change it all the way through.  
2 Specifically, is there a page you were concerned about?

3 MR. CORNELIUS: Not about that. I figured  
4 they were going to eliminate that.

5 MS. TISE: I mean, if you are going to ask  
6 for a lesser of sexual assault.

7 MR. CORNELIUS: That's right.

8 THE COURT: He's not talking about asking  
9 for a lesser. He is talking about the area where we --

10 MS. TISE: Okay. I heard you say lesser,  
11 so I thought you were asking for a lesser straight --

12 MR. CORNELIUS: Into the lesser part of it,  
13 not with respect --

14 THE COURT: The part about entering a  
15 habitation for a sexual assault or another felony.  
16 That's what you are talking about?

17 MR. CORNELIUS: Yes, yes.

18 THE COURT: We changed from aggravated to  
19 just straight sexual assault. We changed that  
20 definition. And so, any reference throughout the charge  
21 should be only to sexual assault, not aggravated sexual  
22 assault. Is that correct? Would you please direct me  
23 to a page?

24 MR. CORNELIUS: I'm busy counting. Page  
25 11.

1 THE COURT: Page 11?

2 MR. CORNELIUS: Yes, ma'am. Where it  
3 starts into the lesser offenses. And, actually, it goes  
4 into 12. Page 11, the lessers. It goes -- the first  
5 one is murder. If you go to Page 12, the first full  
6 paragraph is another application paragraph, but it seems  
7 to me like that goes into the kidnapping and murder. It  
8 seems to me like what they've alleged there is capital  
9 murder. I don't know why that's in there.

10 THE COURT: I was just going to read  
11 through it.

12 That's under B, under 702(b), that's --

13 MR. CORNELIUS: My point would be to get --  
14 for the jury to get to the lesser, I don't know how they  
15 could get there if they felt the child was kidnapped, to  
16 this lesser. The only way to get to a murder lesser  
17 would be if they didn't believe the child was kidnapped.

18 MS. TISE: I agree. It's basically  
19 realleging the capital murder application.

20 THE COURT: So, the question -- which begs  
21 the question: Is murder actually a lesser of this  
22 offense? How would you allege that only murder is the  
23 lesser.

24 MR. CORNELIUS: If they didn't believe the  
25 kidnapping.

1 MS. TISE: The only way you get a  
2 kidnapping lesser is if they don't believe the child was  
3 murdered.

4 MR. CORNELIUS: Right. So --

5 THE COURT: So, we'll have to rephrase  
6 that.

7 MR. CORNELIUS: Well, I think that  
8 application doesn't --

9 THE COURT: All right. So, it should be,  
10 on the application: If you find from the evidence  
11 beyond a reasonable doubt the defendant, Rogelio, and  
12 Carmelo, also known as Rudy, entered into an agreement  
13 to commit the murder of Angelo Garcia, not kidnapping of  
14 Angelo Garcia, and pursuant to that agreement they did  
15 carry out the conspiracy in Harris County, Texas, on or  
16 about the 30th day of -- and then mark out: While in  
17 the course of committing such a kidnapping.

18 MR. CORNELIUS: Correct.

19 THE COURT: Intentionally cause the death  
20 of Angelo Garcia, Jr. by stabbing. I think that maybe  
21 that whole paragraph doesn't apply because 702, what  
22 other felony could they talk about being in the course  
23 of committing other than the kidnapping? So, really  
24 that --

25 MS. TISE: Robbery, burglary of a

1 habitation, aggravated sexual assault. Those are all  
2 cases that they could have conspired to do together and  
3 then the murder being the resulting unintentional  
4 felony.

5 THE COURT: Okay. So, should we put  
6 "entered into an agreement to commit a felony"?

7 MS. TISE: But if they believe it was a  
8 robbery, a burglary, or a sexual assault, again, that's  
9 a capital murder.

10 THE COURT: Exactly.

11 MS. TISE: The only way you get to is a  
12 murder is if you believe there was no other felony.

13 THE COURT: In the course of committing.  
14 So, 702 doesn't really apply to the murder statute under  
15 our facts. Would you agree? 702(b).

16 MS. TISE: I am trying to wrap my mind  
17 around it all.

18 MR. CORNELIUS: I don't know. I guess --  
19 are we on the record? I don't want to be on the record.

20 THE COURT: Let's go off the record so we  
21 can discuss this a little more.

22 MR. CORNELIUS: We're off the record?

23 THE COURT: Yes.

24 (Discussion off the record)

25 (Open court, defendant present, no jury)

1                   THE COURT: Anything that the State wants  
2 to bring to the Court's attention other than what we've  
3 already talked about?

4                   MS. TISE: It's a lot to --

5                   THE COURT: Do you need some more time?  
6 You would like some more time to review it?

7                   MS. TISE: No. I don't know there's  
8 necessarily ever going to be enough time.

9                   THE COURT: We didn't put anything on the  
10 record yesterday about any objections to the charge or  
11 what we -- I want to do that at this time. You asked  
12 for certain things and I want to put on the record  
13 anything that you asked for, Mr. Cornelius, in the  
14 charge after reviewing the charge.

15                  MR. CORNELIUS: I don't think -- I mean I  
16 think I'm pretty happy with the charge. We'll get on  
17 the record when the actual charge gets prepared and I'll  
18 make my --

19                  THE COURT: Okay. All right. Let's go off  
20 the record.

21                  (Pause)

22                  THE COURT: We're back on the record in  
23 Cause No. 1390130, the State of Texas vs. Obel  
24 Cruz-Garcia. And Mr. Cruz-Garcia is present at counsel  
25 table, along with his attorneys, Mr. Skip Cornelius and

1 Mario Madrid. And present for the prosecution is  
2 Natalie Tise, Justin Wood, and their appellate counsel,  
3 Alan Curry, is also present.

4 And we are going to break for the day for  
5 the jury to leave for the day and then we'll continue  
6 with negotiations and discussions of the charge.

7 Would you please bring the jury in, Deputy  
8 Perry?

9 THE BAILIFF: Yes, Your Honor.

10 (Open court, defendant and jury present)

11 THE COURT: Please be seated.

12 Ladies and gentlemen of the jury, I'm sorry  
13 to have you sitting back there for so long today. It is  
14 no individual's fault whatsoever. The Court and the  
15 lawyers have been working diligently to prepare a charge  
16 for you and it is just a difficult task, a long task.  
17 So, we still have a little ways to go. Instead of  
18 having you sit back there this afternoon, I have decided  
19 to go ahead and release you for the day. We're going to  
20 continue to work and finalize the charge so that on  
21 Monday morning we can read that to you immediately and  
22 have arguments of counsel. Okay?

23 And what I'd like to do is start at 9:00 in  
24 the morning on Monday, since we lost some time today.  
25 And what you will find is that the courthouse is a

1 different place trying to get here at 9:00. It's a lot  
2 busier. All of the dockets are held at 9:00, but when  
3 you arrive, use your badge to get through the security  
4 checkpoint. Go to the head of the line with your badge.  
5 You are allowed to do that. And if you get stuck on the  
6 elevators, please give Deputy Perry a call and we can  
7 bring you up on the back elevator. Okay?

8                   So, we can all get here at 9:00 and start  
9 immediately at 9:00 and hopefully we'll be finished by  
10 Monday at the end of the day with argument. Okay?

11                   I want to remind you at this time and  
12 admonish you that you are not to talk amongst yourselves  
13 or with anyone else on any subject connected with the  
14 trial or to form or express any opinion thereon until  
15 the end of the trial.

16                   You are excused for the day. See you on  
17 Monday.

18                   THE BAILIFF: All rise.

19                   (Open court, defendant present, no jury)

20                   THE COURT: Everyone be seated.

21                   Off the record, Mary Ann.

22                   (Recess)

23                   (Open court, defendant present, no jury)

24                   THE COURT: Back on the record in Cause  
25 No. 1384794, the State of Texas vs. Obel Cruz-Garcia.

1 Mr. Cruz-Garcia, the defendant, is seated at counsel  
2 table. The jury is not present. The lawyers for the  
3 defendant are present, Mr. Madrid and Mr. Cornelius.  
4 And present for the State is Justin Wood.

5 And we have a charge, a finalized charge  
6 that we have been discussing and negotiating and  
7 reviewing all day.

8 Have you received a copy of that charge,  
9 Mr. Cornelius?

10 MR. CORNELIUS: Yes, I have, Judge.

11 THE COURT: And Mr. Wood?

12 MR. WOOD: Yes, Your Honor.

13 THE COURT: And so, with the exception of  
14 on Page 8, Line 3 of the page where kidnapping -- the  
15 word "kidnapping" is going to be changed to "capital  
16 murder" where it says: The commission of the offense of  
17 kidnapping, we're going to change that to: The  
18 commission of the offense of capital murder. Okay. And  
19 we have changed that. And I have received a copy of the  
20 change. Neither one of you have that copy in your hand,  
21 but that would be the only change on the charge.

22 MR. CORNELIUS: We do have the copies,  
23 Judge.

24 THE COURT: You do have your copy. Very  
25 good.



1 All right. So, you have your copy of that  
2 charge. And does either side have an objection to the  
3 charge, the finalized charge?

4 MR. WOOD: Just checking them, Judge.

5 THE COURT: Do you want time to review  
6 that?

7 MR. WOOD: No. Just checking on the  
8 change. And I know from the State's standpoint -- we've  
9 been on and off the record a lot today. So, if this is  
10 our final time to state anything on the record regarding  
11 the work that we have done on the charge today, the only  
12 thing we would put on the record is that the State would  
13 object to the jury being instructed on Carmelo Martinez  
14 Santana being considered an accomplice as matter of law.  
15 And I believe it's all on the record that we were  
16 requesting that it be -- he be instructed as a matter  
17 of -- an accomplice as a matter of fact, rather than  
18 law, based on some of the case law that we have  
19 presented to the Court. Specifically, Druery vs.  
20 State -- spelled D-r-u-e-r-y -- styled, 25 S.W.3d 491.  
21 I believe that may have been on the record before.  
22 Other than that, we have no objections.

23 THE COURT: Okay. Thank you, Mr. Wood.  
24 Mr. Cornelius.

25 MR. CORNELIUS: The defense has no

1 objections either, but I'd like to put on the record  
2 that we have worked -- all of us have worked on this  
3 charge since about 10:00 this morning. It is 4:45 right  
4 now. We have not broken for lunch. The charge is the  
5 handiwork of a whole lot of hours of lawyers and the  
6 Judge working. We have done our best to put the best  
7 and fairest charge together for the defendant.

8           The Court has granted all the requests that  
9 I have had in terms of the charge, charges. I did think  
10 at one time -- or considered at one time objecting to  
11 the conspiracy part of the party charge being in here,  
12 but, honestly, I think the State is entitled to it. And  
13 I'll just take the responsibility, if somebody else  
14 later looks at the record and thinks I should have  
15 objected. I can't come up with an objection to why the  
16 State is not entitled to that charge.

17           So, anyway, we have no objections.

18           THE COURT: Okay. Thank you,  
19 Mr. Cornelius.

20           Mr. Obel Cruz-Garcia, do you follow your  
21 counsel in that you have no objections to this charge?

22           MR. CORNELIUS: Judge, he has not seen the  
23 charge. He wouldn't know how to read it.

24           THE COURT: Okay. All right.

25           MR. CORNELIUS: I mean, he knows how to

1 read, but it's not in Spanish.

2 THE COURT: That's true. But you have  
3 discussed it with him?

4 MR. CORNELIUS: I have discussed it with  
5 him and I will have to take the responsibility for the  
6 charge.

7 THE COURT: Okay. Very good.

8 All right. Is there anything further?  
9 Anything else that anyone wants to put on the record  
10 before we recess for the day?

11 MR. WOOD: Nothing from the State.

12 THE COURT: All right. It's 4:45 on Friday  
13 afternoon -- yes, Mr. Cornelius?

14 MR. CORNELIUS: Nothing from us. I just  
15 like to stand when I talk now.

16 THE COURT: All right. It's 4:45 on Friday  
17 afternoon. We're going to recess at this time. We're  
18 going to resume at 9:00 in the morning for reading the  
19 charge and arguments to the jury. And so, we're in  
20 recess at this time.

21 (Proceedings recessed)

22

23

24

25

**REPORTER'S CERTIFICATE**

THE STATE OF TEXAS     )  
COUNTY OF HARRIS     )

I, Mary Ann Rodriguez, Official Court Reporter in  
and for the 337th District Court of Harris County, State  
of Texas, do hereby certify that the above and foregoing  
contains a true and correct transcription of all  
portions of evidence and other proceedings requested in  
writing by counsel for the parties to be included in  
this volume of the Reporter's Record, in the  
above-styled and numbered cause, all of which occurred  
in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of  
the proceedings truly and correctly reflects the  
exhibits, if any, admitted by the respective parties.

WITNESS MY OFFICIAL HAND this the 14th day of  
October, 2013.

/s/ Mary Ann Rodriguez  
Mary Ann Rodriguez, Texas CSR 3047  
Expiration Date: 12/31/2013  
Official Court Reporter  
337th Court  
1201 Franklin  
Houston, Texas 77002  
713.755.7746

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